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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1268

GEORGE MARTINEZ, et. al.,
Appellants,

v.

STATE OF CALIFORNIA, et. al.,
Respondents.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE.

BRIEF, AMICUS CURIAE, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF THE APPELLANTS.

This brief is filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Counsel for Appellants and Counsel for Respondents have consented in writing to our filing; and letters to this effect have been lodged with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Americans for Effective Law Enforcement, Inc., (AELE) is a national, not-for-profit organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.

2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of the law abiding citizens.

3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problem of crime and punishment.

The Victims Rights Center is an integral part of AELE. The Center explores the question of the legal rights of the victims of crime. This case, which we consider to be a case of first instance before this Court, squarely presents the question of whether victims (or their survivors) may seek redress under the Constitution and statutes of the United States against state correctional officials whose gross negligence in the release of a prisoner proximately causes the death of, or injury to, the victim. We can

think of no more important issue, insofar as victims' rights are concerned, to come before this Court.

ARGUMENT

I. IMPORTANT PUBLIC POLICY CONSIDERATIONS DICTATE THAT STATE OFFICIALS BE HELD ACCOUNTABLE IN CASES INVOLVING GROSS NEGLIGENCE IN THE RELEASE OF PRISONERS.

Amicus will not reiterate the legal arguments, made by Appellant Martinez, at any length; although we agree with them and wish to associate ourselves with them. We will, in this brief, discuss what we believe to be the important public policy considerations which underlie the issues in the instant case.

The question to be resolved: whether officials of the State of California should have absolute immunity from the consequences of their decision to release a patently dangerous offender into society, is relatively straightforward. The policy issues presented by this case, however, have the greatest possible ramifications for the rights of victims of crime, and, perhaps more importantly, they concern the prevention of future victimization by those who are released.

In recent years courts across the nation have been more and more confronted with this issue; and they have often reached conclusions that are

diametrically opposed.[1] Two cases are illustrative of this dichotomy.

In Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 141 Cal. Rptr. 189, (1977), a certain Daniel Gibson had been incarcerated for first-degree robbery and ordered to undergo psychiatric evaluation. The results of this examination were that:

> ...Gibson has a schizoid personality; a probable neurotic compulsion; that he tended to project and act out great anger towards people; that he exhibited hysterical reactions to stressful situations; and that he extracted compensation in a direct and inappropriate manner from those who he believed had harmed him (141 Cal. Rptr., at 191).

Psychiatric jargon aside, it was evident from this evaluation that Gibson was a dangerous man, likely to victimize again. Gibson was, nonetheless, released on probation and was placed under the supervision of Yolo County probation officers Myers and Cobb. Shortly thereafter, Gibson, while still on probation, proceeded to steal some bees from Mr. Whitcombe, who with an employee named Hernandez, assisted the police in the investigation of the theft which led to Gibson's arrest for the crime.

Gibson was released on bail and, six days later,

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[1] See, e.g. Semler v. Psychiatric Institute, 538 F. 2d 121 (4th Cir. 1976), cert. den 97 S. Ct. 83 (1976); Rieser v. District of Columbia, 580 F. 2d 647 (D.C. Cir., en banc, 1978). See generally Inbau and Carrington, "Victims Rights Litigation. A Wave of the Future?" 11 U. Rich. Law Rev. No. 3, Spring 1977, P. 447.

according to the California Appellate Court, assaulted and severely injured Mr. Whitcombe and Mr. Hernandez:

> Forcing Whitcombe to lie down [Gibson] crushed his skull with the butt end of a shotgun and repeatedly struck him with a hammer. Similarly, forcing Hernandez to the ground, he bound his hands and feet; and with a rope about his neck, strangled him into unconsciousness (141 Cal. Rptr. at 191).

Whitcombe and Hernandez sued the County of Yolo for the negligence of the probation officers in failing to investigate the activities of probationer Gibson and failing to protect them from Gibson's depredations. The California Appellate Court for the Third District found against Whitcombe and Hernandez. For purposes of this brief the most pointed statement that the Court (Reynoso, J.) made was that:

> ...of paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs. Were we to find a cause of action stated we would in effect be encouraging the detention of prisoners in disregard of their rights and society's needs. (141 Cal. Rptr. at 199). (Emphasis supplied)

This judicial pronouncement comes as close as possible to articulating the basis for a total immunity for negligent correctional officials. The

philosophy embodied in this statement seems to be that the "rights" of convicted criminals to early release with little or no supervision (no matter how dangerous they may be) are the only consideration for courts and correctional officers; hence, their decisions must be unfettered and cloaked with absolute immunity, in the name of "rehabilitation."

We submit that any such philosophy ignores the rights of the potential victims of those who are released before they should be. The legal theory evidenced by the absolute immunity doctrine basically says that we must "take a chance" with the safety of society in order to vindicate the theory of rehabilitation. Causes such as the instant case, in our opinion, demonstrate that this may be too high a risk for society to hazard.

The opposite end of the spectrum to the Whitcombe philosophy is to be found in the case of Grimm v. Arizona Board of Pardons and Paroles, 564 P 2d. 1227 (1977) decided by the Supreme Court of the State of Arizona. Grimm is factually on a par with the Whitcombe case and almost on all fours with the instant case, yet a totally different conclusion was arrived at by the court in Grimm.

In Grimm, one Mitchell Thomas Blazak was confirmed in the Arizona Penitentiary in 1967 for armed robbery and assault with intent to kill. Blazak's psychiatric evaluation was, like that of Daniel Gibson in Whitcombe, ominous. He was:

> ...an extremely dangerous person who should not be free in society until some major psychological changes take place. He is a paranoid schizophrenic whose psychosis prevents him from distinguishing between right and wrong and from controlling his conduct. He has never made an adjustment to society for any prolonged period and is unlikely to change. He has a definite potential for violence. 564 P. 2d, at 1230.

As in Whitcombe, and in the instant case, the releasing authorities in Grimm apparently chose to ignore the evaluations of competent medical authorities who, presumably, were retained precisely for the purpose of making such evaluations. Blazak was released by the Arizona Board of Pardons and Paroles after serving one-third of his sentence. On December 15, 1973 he murdered Mr. John Grimm and seriously injured another in an armed robbery in Tucson.

Mr. Grimm's wife sued the Arizona Board of Pardons and Paroles, alleging that the "grossly negligent and reckless release"[2] of Blazak was the proximate cause of her husband's death.

In the Grimm case, the Arizona Supreme Court, unlike the California Appellate courts in Whitcombe and in the instant case, took what might be aptly called a "victim oriented" point of view.

Although Arizona had a statute in effect at the time that the Grimm case arose which authorized and set forth criteria for release of offenders on parole,[3] the Supreme Court of that state held that the

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[2]/ 564 P 2d, at 1230.

[3]/ Ariz. Rev. Stat. #31-412.

members of the Board of Pardons and Paroles could be sued, in their personal capacities, for negligence in the release of Blazak.[4]

The rationale of the Arizona Supreme Court was 180 degrees at variance with the rationale of the Court in Whitcombe. Whereas the Whitcombe court concerned itself solely with the "rights" of convicted criminals to early release, the Arizona court dealt with the question of the "accountability" of public officials who make decisions as to the release of convicted criminals. The court concluded that Mrs. Grimm had stated a cause of action in negligence, adding:

> We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society. The authority wielded by so-called faceless bureaucrats has often been criticized. Comparing the relatively small number of judges with the large numbers of administrators, the idea of fearless, unbridled decision-making becomes less appealing. While society may want, and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats

[4]/ 564 P 2d at 1230.

> exercise over our lives the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officers liable for shocking outrageous actions.
>
> In any case, democracy by its very definitions implies responsibility (citations omitted). In this day of increasing power wielded by government officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.[5]

The Arizona Supreme Court was, however, careful to distinguish between the "second guessing" of any and all dispositions of correctional officials in their decisions to release and the imposition of liability for gross negligence. In this context it stated:

> We believe that a limited immunity for members of the Board of Pardons and Paroles with liability only for the grossly negligent or reckless release of a highly dangerous prisoner strikes the proper balance between the competing interests. The public has an interest in protection from premature release of highly dangerous prisoners as well as an interest in holding public officials responsible for outrageous conduct. The Board members have an interest in suit from reasonable decisions.[6]

[5]/ 564 P 2d at 1233.

[6]/ 564 P 2d at 1235.

Amicus will cite one final case as authority for the principle that the rights of society must be balanced against the purported rights of offenders to premature (and often grossly negligent) release. This case, one we believe to be of first instance, is Semler v. Psychiatric Institute, 538 F 2d. 121 (4th Cir., 1976). cert. den 97 S. Ct. 83 (1977).

Semler, we submit, lays down the proper guidelines for cases in which crime victims (or their survivors) file suit against negligent custodial officials. The Semler case is even closer to the factual situation of the instant case than Grimm or Whitcombe. Semler involved the murder of a 14-year-old girl who was abducted from the Maderia School in McLean, Virginia, tied to a tree, sexually molested and left to die of exposure by one John Gilreath on October 29, 1973.

Gilreath, a mentally disturbed individual (as was Richard June-Jordan Thomas in the instant case) had been convicted of abducting a young girl from the same Maderia School in October of 1971. He was sentenced to 20 years imprisonment; however, Gilreath's psychiatrist and his probation officer prevailed upon the sentencing judge to commit the defendant to the privately-owned Psychiatric Institute, in Washington, D.C., in lieu of incarceration in the penitentiary. Virginia Circuit Court Judge William Plummer agreed to this commitment but only on the condition that Gilreath not be permitted to leave secure confinement without a prior order of the court.

After a certain amount of temporary releases to out-patient status, based upon court approval, Gilreath's psychiatrist and his Virginia State

Probation Officer, took it upon themselves to release him to full-time out-patient status, without notice to, or the approval of, the sentencing court. Gilreath then proceeded to the Maderia School and abducted and murdered Natalia Semler.

The Semlers sued the Psychiatric Institute, Gilreath's psychiatrist, Dr. Wadeson, and the Virginia Probation Officer, Paul Folliard, for negligence in the release of Gilreath. The United States District Court for the Eastern District of Virginia,[7] sitting without a jury awarded the Semlers damages of $25,000 in wrongful death.[8]

The case was appealed to the United States Court of Appeals for the Fourth Circuit, which, in an unanimous panel opinion, affirmed the judgment for the Semlers. The analysis of the situation made by the Fourth Circuit is, we believe, instructive in a case of first instance before this Court such as the instant case.

The appellate court acknowledged that it could find no Virginia law precisely on the point at issue, so it turned to general principles of tort law.[9] Specifically, the Court reaffirmed the theory of the

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[7]/ This was a diversity of citizenship case because the Semlers lived in Virginia and the Psychiatric Institute, where Gilreath was committed, was located in Washington, D.C.

[8]/ We note, parenthetically, that the Semlers did not file the lawsuit for reasons of monetary gain. The entire amount of the award was placed in a trust fund, in Natalia Semler's name, to support scholarships for foreign affairs students. In the words of the Semlers' attorney, Robert Lewis, Esq.: "...they were very interested in seeing that this kind of thing didn't happen again." Monograph "Victims of Crime or Victims of Justice" American Bar Association, Criminal Justice Section, Committee on Victims, August 10, 1977, Chicago, Illinois.

[9]/ Citing: Trimeyer v. Norfolk Tallow Company, 192 Va. 776, at 780, 66 S.E. 2d 441, at 443, (1953).

Restatement of Torts (2d) #319 (1965):

> One who takes charge of a third party whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Applying this standard to the facts of the Semler case, the 4th Circuit found duty, breach and proximate cause of injury to Natalia Semler by John Gilreath, and it affirmed the judgment against the Psychiatric Institute, Dr. Wadeson and Probation Officer. Folliard.

Dr. Wadeson and the Psychiatric Institute were, of course, private parties so there was no question of sovereign immunity with regard to them. Defendant Folliard attempted to impose the defense of sovereign immunity under the contention that his acts were discretionary and therefore immune from civil liability. Under Virginia law, a state employee who exercises discretionary judgment is immune for liability for negligence.[10]

The Fourth Circuit rejected this defense, stating that because of the court's order not to release Gilreath without the approval of the sentencing court, Folliard's actions were ministerial and not protected by the doctrine of sovereign immunity.

We submit that the instant case comes squarely within the ambit of the rationale of Semler v. Psychiatric Institute. The Court in sentencing

[10] Lawhorne v. Harlan, 214 Va. 405, 200 S.E. 2d 569 (1973).

Richard June-Jordan Thomas recommended, if not actually ordering, that Thomas not be placed on probation and Thomas' record was such as to put any correctional official on notice that he was a very dangerous offender, and this was confirmed by the California psychiatric clinic at Atascadero.

Indeed, the Court of Appeals in Semler noted that: "Confinement of Criminals frequently is intended to protect the public, as well as punish and rehabilitate the wrongdoer."[11]

We believe that the legal principles enunciated in Semler and Grimm, supra, embody a reasonable and accurate description of what the law in this area ought to be. Certainly the Appellant in this case, Mr. Martinez asks no more of this Court. In seeking redress in this case, Plaintiff/Appellant requests this Court only to limit, under federal law,[12] the absolute immunity which the lower court held protected the defendants from any of the consequences of their conduct in the release of Richard June-Jordan Thomas.[13] Plaintiff/Appellant specifically requests this Court to limit the absolute immunity of government officials to a standard of "good faith."[14] We agree with the Courts in Grimm and Semler, supra, that such a ruling would balance the competing interests in cases such as this one.

This, of course, as not to state that there is no evidence of gross negligence in the instant case. Just

[11] 538 F 2d, at 124.

[12] 42 U.S.C. 1983.

[13] Govt. Code, California, #845.8.

[14] Martinez v. California, No. 1268, Jurisdictional Statement, at p. 15.

the opposite is true. This case is a classic example of why the absolute immunity of state correctional officials should be limited.

First, the killer of Mary Ellen Martinez had a record of sexual offenses, having attempted the forcible rape and torture of two young females in Tecolate Canyon in San Diego and having been convicted of that offense on December 12, 1969.

Second, he was determined to be a "mentally disturbed sexual offender" (MDSO) by the Atascadero State Mental Hospital and "not amenable to treatment."

Third, he had been sentenced to six months to 20 years for the original Tecolote Canyon attempted rapes, the sentencing court making the specific comment that he should not be paroled.

Fourth, he received no treatment while confined.

Fifth, Thomas himself had admitted to the authorities that he did not feel himself ready for parole and "...feared actions he might take if he in fact were paroled."[15]

It is difficult to imagine a factual situation of more egregious gross negligence, than in this particular case, when the California Adult Authority released Thomas after he had served five years. Even after his release he was not supervised on parole and, as might have been expected, Thomas returned to Tecolote Canyon and kidnapped and murdered Mary Ellen Martinez. If all of the elements of a cause of action sounding in tort: gross negligence, breach of a legal duty, proximate cause

[15]/ Information taken from the Jurisdictional Statement of Plaintiff/Appellant, pp. 5 & 6.

of injury, and extreme damage, do not lie in this case, there would be few similar cases in which they would lie. Semler v. Psychiatric Institute, supra.

It would appear that the sole barrier to recovery by the parents of Mary Ellen Martinez is California Government Code, Section 845.8(a), which purports to confer absolute immunity on correctional officials for the release of offenders. Plaintiff/Appellant seeks a ruling from this Court that this provision is unconstitutional. We submit that this point is well taken and urge this Court so to rule. Scheuer v. Rhoades, 416 U.S. 232 (1974), Wood v. Strickland, 420 U.S. 308, (1975)., Butz v. Economou, 438 U.S. 478 (1970).[16]

This Court has been vigilant to protect the rights of citizens who have been abused by the unlawful acts of government officials, particularly in the area of misconduct by state and federal police officers: Monroe v. Pape, 365 U.S. 167 (1961); Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Should the Court be less vigilant when the federally-protected right to life is violated through the gross negligence of state correctional officials? We submit that it should not.

Amicus would like to state emphatically that we are aware of the difficulties of the jobs performed by parole, probation and correctional officials in this country. Their jobs are as demanding as that of the policeman, "on-the-street" who is required to make instantaneous value judgments as to what he can or cannot do, usually under the exigent pressures of

[16]/ See also: Patricia J. v. Rio Linda Union School District, App. 132 Cal. Rptr. 211 (1976).

police work. Yet policemen are held accountable for their actions.

We do not suggest that correctional officials should be "second guessed" in every case that they make a disposition that goes awry. We do suggest that in cases such as this one, where gross negligence on the part of the releasing authority has been shown, some sort of accountability should be mandated by the Constitution and statutes of the United States.

No amount of monetary award in civil damages is going to bring Mary Ellen Martinez back to life; this is obvious. However, if correctional authorities in California and in other states are put on notice that they are accountable for gross negligence in the release of prisoners, then perhaps they will weigh in the balance the potential threat to society of their dispositions. If this should transpire future victims of the kind of crime illustrated by the tragic facts of the instant case and Semler, Whitcombe, and Grimm, may not be murdered, raped, assaulted, kidnapped, and so on.

We respectfully urge this Court to reverse the judgment of the California Court of Appeals.

CONCLUSION

For the reasons stated in our argument section we urge this Court to hold that the Constitution of the United States and particularly Title 42, Section 1983 limits blanket-immunity statutes such as Cal. Govt. Code 845.8 when gross negligence in the release of, and lack of supervision of, a dangerous prisoner is shown.

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief of Amicuscuriae upon counsel of record for the appellee, Honorable Jeffrey T. Miller, Deputy Attorney General, State of California, 110 West A - Suite 600, San Diego, California 92101, and Donald McGrath II, Suite 1405, 1200 3rd Avenue, San Diego, California 92101, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the appellee as set forth above, on or before July 5, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before July 5, 1979.

FRANK CARRINGTON

Counsel for Appellant